No. 676

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IN THE

SUPREME COURT

OF THE

United States

OCTOBER Term, 1955 54

CALIFORNIA DOLOMITE COMPANY, a California corporation,

Plaintiff,

vs.

EARL S. STANDRIDGE, S. M. MINGUS,

Defendants, Plaintiffs in Interpleader and Appellants.

NICHOLAS G. BAXTER, MARY E. BAXTER, NORRIS H. WILLIAMS, BERNICE WILLIAMS, W. E. MERRITT, E. A. KUEHNE, C. H. WOOD, MILDRED PRATT, ANTHONY FERNANDEZ, ALICE E. FERNANDEZ, SAM L. SMITH, LILLY M. SMITH,

Defendants, Defendants in Interpleader and Respondents.

PETITION FOR WRIT OF CERTIORARI ~~TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND~~ TO THE DISTRICT COURT OF APPEAL, IN AND FOR THE FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA.

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Defendants, Defendants in Interpleader and Respondents.

No.....

PETITION FOR WRIT OF CERTIORARI ~~TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND~~ TO THE DISTRICT COURT OF APPEAL, IN AND FOR THE FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA.

To the Honorable Chief Justice and the Associate Justice of the Supreme Court of the United States:

EARL S. STANDRIDGE and S. M. MINGUS, the petitioners herein, pray that a writ of certiorari be issued to review the final decree of the Supreme Court of the State of California denying a hearing on appeal from the decree of the District Court of Appeal in and for the Fourth Appellate District, State of California, which affirmed the decree of the Superior Court of the State of California in and for the County of San Bernardino quieting title as against petitioners to certain placer mining claims located on the public lands of the United States; and from the decree of the District Court of Appeal in and for the Fourth Appellate District, State of California, which affirmed the decree of the Superior Court of the State of California in and for the County of San Bernardino quieting title as against petitioners to certain placer mining claims located on the public lands of the United States.

OPINIONS OF THE COURTS BELOW

Opinion of the Supreme Court of the State of California denying hearing on appeal from the decree of the District Court of Appeal in and for the Fourth Appellate District, State of California. Reported in minutes of the Court, Advance California Reports, 43 A. C. No. 30 (Appendix A).

Opinion of the District Court of Appeal in and for the Fourth Appellate District, State of California. Reported in Advance California Appellate Reports, 128 A. C. A. No. 5, page 756 (Appendix B).

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Minute Order of the Superior Court of the State of California in and for the County of San Bernardino. Unreported (Appendix C).

Opinion of the Superior Court of the State of California in and for the County of San Bernardino, State of California. Unreported (Appendix D).

JURISDICTION

1. Hearing on appeal to the Supreme Court of the State of California from decree of the District Court of Appeal in and for the Fourth Appellate District, State of California, denied and order filed January 5, 1955.

2. Decree of the District Court of Appeal in and for the Fourth Appellate District, State of California, filed November 10, 1954, and remittitur to the Superior Court of the State of California, in and for the County of San Bernardino, filed January 12, 1955.

3. Petition for rehearing in the District Court of Appeal was denied December 7, 1954.

4. Petition for an order staying remittitur pending filing of petition for writ of certiorari in the Supreme Court of the United States was denied January 11, 1955.

5. Jurisdiction of this court is invoked under Section 1257 (3) of Title 28 of the United States Code, which provides as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) . . . . . .

(2) . . . . . .

(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held, or authority exercised under, the United States."

QUESTIONS PRESENTED FOR REVIEW

The Federal question of substance decided by the State Court was that a locator of placer mining claims on public surveyed lands of the United States could be ousted of his title and possession by another's placer mining location of the same public lands twenty years thereafter, said subsequent location occurring during a year when an Act of Congress provided for the suspension of requirement of performance of annual labor on mining claims, and at a time when the original locator had fully complied with the applicable laws of the United States for holding mining claims for at least seven continuous years prior to the subsequent location. Said decision of the State Court is based on the conclusion that there was insufficient proof by the original locator of posting the original location notices upon the particular subdivisions of the public surveyed lands described in his location notices.

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Said State Court decision set forth a construction of a Federal Statute, Section 2332 United States Revised Statutes (Section 38, Chapter 2, Title 30, United States Code Annotated), which it is believed has not heretofore been decided by the Supreme Court of the United States but which decision of the State Court is in part probably not in accord with decisions of the Supreme Court of the United States in the following cases:

Yosemite Gold Min. and Milling Co. vs. Emerson, 208 U. S. 25, 52 L. Ed. 374, 28 S. Ct. 196;

Cole vs. Ralph, 252 U. S. 286, 64 L. Ed. 567, 40 S. Ct. 321;

U. S. Smelting Refining and Mining Co. vs. Lowe, 338 U. S. 954, 94 L. Ed. 588, 70 S. Ct. 493.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS

1. Federal Statute, Section 38, Chapter 2, Title 30, United States Code Annotated (USCA). (Section 2332, United States Revised Statutes (USRS)). Appendix E.

2. Division 2, Part 4, Title 2, Section 1007 of the Civil Code of the State of California, pertinent to these issues, provides as follows:

"1007. (TITLE BY PRESCRIPTION, HOW ACQUIRED: CERTAIN CLASSES OF GOVERNMENTAL PROPERTY EXEMPT.) Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action

for the recovery of the property confers a title thereto, denominated a title by prescription, . . ."

3. Part 2, Title 2, Chapter 2, Section 321 and Section 322 of the Code of Civil Procedure of the State of California, provides as follows:

"321. POSSESSION, WHEN PRESUMED: OCCUPATION DEEMED UNDER LEGAL TITLE, UNLESS ADVERSE. In every action for the recovery of real property, or the possession thereof, the person establishing the legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action. (Enacted 1872)."

"322. OCCUPATION UNDER WRITTEN INSTRUMENT OR JUDGMENT, WHEN DEEMED ADVERSE. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely,

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except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract. (Enacted 1872.)"

4. Acts of Congress involving suspension of requirement of performance of annual work on mining claims.

(a) Suspension from July 1, 1941 to July 1, 1943 —Act May 7, 1942, C 294; 56 Stat. 271 (Appendix F-1).

(b) Suspension from date of Act until the 1st day of July following proclamation of cessation of hostilities for World War II. Act of May 3, 1943, C. 91; 57 Stat. 74 (Appendix F-2).

(c) Suspension of requirements to July 1, 1948— Act June 17, 1948, C. 494; 62 Stat. 475 (Appendix F-3).

(d) Suspension of requirements to July 1, 1949— Act June 17, 1949, C. 221, Section 1, 638 Stat. 200 (Appendix F-4).

(e) Act extending time for performance of annual assessment work on mining claims for year 1949 to 1950 to October 1, 1950. Act June 29, 1950, C. 404, 64 Stat. 275 (Appendix F-5).

STATEMENT OF THE CASE

On February 7, 1951, the California Dolomite Company filed an action in the Superior Court of San Bernardino County, California, to COMPEL CONFLICTING CLAIMANTS TO INTERPLEAD AND LITIGATE THEIR CLAIMS AMONG THEMSELVES. The plaintiff was engaged in mining operations in the Silver Mountain Mining District of the County of San Bernadino, State of California. Plaintiff claimed to occupy the property under and by virtue of two mining leases; one dated May 25, 1949, as amended on December 3, 1949, and the other dated February 11, 1950. Both of these leases were executed by defendants in interpleader. The complaint sets forth that plaintiffs in interpleader, petitioners herein, claimed title to the mining properties under said leases by virtue of mining locations made prior to those of defendants in interpleader, and prayed that the two claimants be required to interplead together concerning their claims to the property so that plaintiff might safely determine to whom said rents and royalties should be paid.

Standridge and Mingus, your petitioners, filed their complaint in interpleader and throughout the trial were designated as plaintiffs, Nicholas G. Baxter and his associates, respondents below, being designated as defendants. Only the issues as to the rights of the respective groups designated plaintiffs and defendants were determined on the trial of the issues, no question

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of individual rights of the separate parties in either group being in issue.

All of the placer mining claims in issue were located in Township 8 North, Range 6 West, San Bernardino Base Meridian, San Bernardino County, California. All of said claims were, prior to plaintiffs' locations, a part of the unappropriated public surveyed lands of the United States.

Plaintiffs introduced in evidence their original placer location notices covering all of Section 32, these placer locations being the SILVER REEF, southeast quarter; the CALCITE, northeast quarter; the GREAT NORTHERN, northwest quarter; and the POLAR BEAR, southwest quarter. Plaintiffs also introduced in evidence a placer location notice involving the MIDWEST claim, being the southwest quarter of Section 28. All of these location notices described the land claimed, by reference to the United States Survey of the area. These location notices further described the point at which the discovery monuments were erected, and location notices placed, by distance and direction from section corners or quarter section corners of the public surveyed land, as well as references to known landmarks. The four placer mining locations involving Section 32 were dated July 1, 1929 and recorded in the Office of the County Recorder of San Bernardino County, California, on July 2, 1929. The MIDWEST claim location notice in Section 28 was dated July 1, 1931 and recorded in the Office of

the County Recorder of San Bernardino County, California on July 3, 1931.

Defendants claimed that they were the owners of a portion of Section 32 by virtue of placer mining locations made in 1949. They claimed the east half of Section 32 (Silver Peak Lime #1 and Silver Peak Lime #2 placer claims) by virtue of discovery, location and the recording of placer mining locations in the Office of the County Recorder in San Bernardino County, California on February 9, 1949, and claimed the south half of the northwest quarter and the north half of the southwest quarter of Section 32 (Defender Group Placer Claim) by virtue of acts of discovery, location and recordation of placer mining location notice on July 13, 1949. All of the defendants' location notices described the land claimed by reference to United States Survey of the area and covered 480 acres of the identical ground in Section 32 on which plaintiffs had located in 1929.

Defendants further claimed a mill site location (Silver Peak mill site), being the west half of the southwest quarter of the southwest quarter of the southwest quarter (5 acres) of Section 28. This mill site location notice was recorded on August 9, 1949, and the land involved was a portion of the MIDWEST claim located by plaintiffs in 1931.

Plaintiffs introduced into evidence by reference to the records of the County Recorder of San Bernardino County, California, affidavit of proof of labor on the

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POLAR BEAR and GREAT NORTHERN placer mining claims for the assessment year ending July 1, 1941 and affidavit of notice to hold mining claims under the applicable provisions of the Acts of Congress, providing for the suspension of annual assessment work on mining claims, for the SILVER REEF, CALCITE, GREAT NORTHERN and POLAR BEAR mining claims for the assessment years 1941 to 1949, inclusive, all of said affidavits being attested by S. M. Mingus, one of the plaintiffs. They further introduced into evidence affidavits of proof of annual labor for the assessment years ending July 1, 1950 and July 1, 1951.

Affidavits of notice to hold mining claims for the assessment years July 1, 1944 to and including July 1, 1949, involving the MIDWEST placer mining claim in Section 28, were read into evidence from the records of the County Recorder of San Bernardino County, California, and affidavit of proof of annual labor involving the assessment years July 1, 1949 to and including July 1, 1951, covering the MIDWEST placer mining claim, were also read into evidence from the records of the County Recorder of San Bernardino County, California.

Defendants located this property on which their claim is based during the period covered by the Acts of Congress (62 Stat. 475) (63 Stat. 200) (64 Stat. 275), set forth in full in Appendix F-3, F-4, F-5, and during a time when the plaintiffs had performed all acts

necessary to hold said mining claims, as required by said Statutes. While performing annual assessment work on these mining claims in the year 1950 in conformity with the Act of Congress (64 Stat. 275), Appendix F-5, plaintiffs discovered that the California Dolomite Company was engaged in, or was preparing to engage in, mining activities on the property under the leases from defendants. Claim of ownership of the properties involved was made known to the California Dolomite Company, resulting in the filing of the complaint heretofore referred to.

Plaintiffs claimed ownership of additional contiguous placer mining claims in the same area and proof submitted during the trial, in establishing performance of annual labor over the period which said properties were claimed by plaintiffs, involved adjoining contiguous claims as well as the placer mining claims in dispute. Various proofs of labor, notices to hold mining claims and claims of exemption as recorded in the Office of the County Recorder for the year 1934 to 1941, with the exception of the mining year 1940-41, were introduced in evidence but are not considered to be important in the determination of the issue now before the Supreme Court of the United States.

There was no question of abandonment of the mining claims raised on the trial of the issues; in fact, the Trial Court specifically states, Unnumbered Volume Reporter's Transcript of John W. Kirkpatrick, Jr., page 24, lines 13-17 inclusive: "Now as far as the other points are concerned I couldn't find that there

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was any intention to abandon here because Mingus had kept filing these notices of intention to claim. That is contrary to any intention to abandon."

Neither was there any evidence of forfeiture of plaintiffs' mining claims. No adverse placer relocation of the lands claimed by plaintiffs were made from the date of plaintiffs' locations in 1929 and 1931 until the date of defendants' relocation in the year 1949.

S. M. Mingus, plaintiff, and one of the petitioners herein, was one of the original locators of the placer mining claims involved in plaintiffs' case, and was, at the time of the trial, 82 years of age. He testified that he was one of the locators who actually placed the location monuments on the ground.

On the 22nd day of September, 1952, following the close of trial in May of 1952, the court issued a minute order, Appendix-C, in which the court found as follows:

> "After reviewing the evidence at length and with considerable care, the court concludes that the testimony of Mr. Mingus is so contradictory in several different and material respects that it does not carry the convincing force essential to a finding that the location notices under consideration were actually posted upon the quarter sections claimed thereby."

Following the entry of the above minute order upon plaintiffs determining the basis for the court's decision, a motion for a new trial was made under appropriate provisions of the California law. The Trial

Court denied the motion for new trial and entered judgment for defendants, filing an opinion of the Trial Court which appears as Appendix-D herein. Notice of appeal and appeal from the judgment of the Trial Court was made by plaintiffs.

After decree for respondents upholding the judgment of the Trial Court was entered in the District Court of Appeals of California, a petition for rehearing on behalf of plaintiffs was made. Rehearing was denied in the District Court of Appeal of California and a subsequent petition for hearing in the Supreme Court of the State of California was denied.

TIME AND MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED

I.

Until service of the minute order of the 22nd day of September, 1952, plaintiffs, petitioners herein had no knowledge of the basis on which the Trial Court would found their opinion. When this minute order of the Trial Court (Appendix-C) was served upon petitioners, it was learned that the Trial Court was entering judgment against petitioners on the grounds that the testimony offered on behalf of petitioners did not carry the convincing force essential to a finding that the location notices under consideration were actually posted upon the quarter sections claimed thereby.

After service of the copy of the minute order of the 22nd day of September, 1952, your petitioners pre-

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pared and forwarded for filing in the Trial Court on the 11th day of October, 1952, a Notice of Intention to Move for New Trial, which pleading was filed on October 14, 1952, in the Office of the Clerk of the Superior Court in and for the County of San Bernardino, State of California.

In this Notice of Intention to Move for New Trial, petitioners specifically cited the provisions of Section 38, Chapter 2, Title 30, of the United States Code Annotated and cited to the Trial Court specific cases from the Appellate Courts of the State of California substantiating the contention of petitioners that said United States Statute obviated the necessity of submitting proof of the posting of location notices where the claimant to mining claims located on public surveyed lands of the United States had held said mining claims for a period of more than five years prior to adverse claims of subsequent locators; the applicable portion of said pleading being set forth herein as (Appendix-G).

On February 17, 1953, the Trial Court filed its findings of facts and conclusions of law and judgment in this matter, quieting title to the placer mining claims in question in the defendants and denying the title and interest of plaintiffs, petitioners herein. The Trial Court at this time filed its opinion (Appendix-D) herein. The petitioners again filed a Notice of Intention to Move for New Trial, again raising the question in the Trial Court on the Federal question presented herein (Appendix-G). By minute order dated the 20th

day of April, 1953, the Trial Court denied petitioners motion for new trial.

II.

The Federal question was raised in the District Court of Appeal, Fourth Appellate District, State of California, in APPELLANT'S OPENING BRIEF—STATEMENT OF FACTS, the applicable portions of said brief appearing herein as (Appendix-H). The same Federal question was again presented to the District Court of Appeal in Appellant's Reply Brief, the applicable portion of which is set forth in (Appendix-I).

The Federal question was again raised in the District Court of Appeal on Petition For Rehearing, the applicable portions being set forth herein as (Appendix-J).

The Federal question involved herein was again raised on APPELLANT'S PETITION FOR HEARING in the Supreme Court of the State of California, the applicable portions of which are set forth herein in (Appendix-K).

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BRIEF IN SUPPORT OF PETITION

Throughout our mining history, one of the greatest problems faced by the prospector or miner has been the protection of prior mining locations from the actions of subsequent locators, those termed claim jumpers in mining parlance. Particularly has this problem existed in regard to locations on mineral deposits which require large scale operations and large capital investments in order to be most profitably developed, which claims must in many cases further require that the original locator hold and maintain his interest in said claims for a considerable period of time while securing or interesting capital in the development of the mining claims. Such a situation existed here. The mineral deposits primarily located on the disputed claims were dolomite, a lime type of product. Mining operations on this deposit are conducted in open pits or quarries.

To meet this problem, Congress did, on July 9, 1870, enact legislation, Chapter 2, Title 30, Section 38, United States Code Annotated (Section 2332, U. S. Revised Statutes) which set forth that evidence of possession and working of mining claims for a period equal to the time prescribed by the Statute of Limitations for mining claims in the State where same was situated, was sufficient to establish a right to a patent (Appendix-E. App. 20).

While this statute specifically relates to applications for patent of mining claims, it has been almost universally held that the provisions set forth applied

with equal force within the states to disputed titles on unpatented mining claims. *Belk vs. Meagher,* 104 U. S. 279, 26 L. Ed. 735; *Reaves vs. Fianza,* 215 U. S. 16, 30 S. Ct. 1, 54 L. Ed. 72; *Cole vs. Ralph,* 252 U. S. 286, 40 S. Ct. 321, 64 L. Ed. 567; *Springer vs. Southern Pacific,* 67 Utah 590, 248 Pac. 819; *Newport Mining Co. vs. Bead Lake Gold Mining Co.,* 110 Wash. 120, 118 Pac. 27; *Humphreys vs. Idaho Gold Mining Development Co.,* 21 Idaho 126, 120 Pac. 823, 40 L.R.A. (N.S.) 826; *Oliver vs. Burg,* 154 Ore. 1, 58 Pac. 2nd 245. In California a long line of cases have also applied the Federal statute to disputed unpatented mining claims. *Judson vs. Harrington,* 71 Cal. App. 2nd 565, 162 Pac. 2nd 931; *Dalton vs. Clark,* 129 Cal. App. 136, 18 Pac. 2nd 752; *McLean vs. Ladewig,* 2 Cal. App. 2nd 21, 37 Pac. 2nd 502; *Hess vs. Moody,* 35 Cal. App. 2nd 401, 95 Pac. 2nd 690; *Lind vs. Baker,* 31 Cal. App. 2nd 631, 88 Pac. 2nd 777.

The possession required to bring the applicable force of this Federal statute into effect is only that possession which is required to hold mining claims as set forth in the laws of the United States and local regulations not inconistent therewith. *Wilbur vs. United States,* 280 U. S. 306, 50 S. Ct. 103, 74 L. Ed. 445; *Cole vs. Ralph,* 252 U. S. 286, 40 S. Ct. 321, 64 L. Ed. 567; *Union Oil Co. vs. Smith,* 249 U. S. 337, 39 S. Ct. 308, 63 L. Ed. 635. The actual possession which is required in the case of agricultural lands and which is understood to be *pedis possessio* is not required in respect of mining claims. *Attwood vs. Fricot,* 17 Cal. 37, 76 Am. Dec. 567.

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The effect of the Federal statute (30 U.S.C.A., Section 38) is simply to declare that possession for the statutory period is equal to a valid location, it obviates the necesity of proof of valid location notices and is equivalent to proof of valid locations. *Cole vs. Ralph*, 252 U. S. 286, 40 S. Ct. 321, 64 L. Ed. 567; *Judson vs. Harrington*, 71 Cal. App. 2nd 565, 162 Pac. 2nd 931.

While the Federal laws require the performance of yearly annual work to be performed or improvements made on mining claims in order to retain title (30 U.S.C.A., Section 28; Sections 23, 24 Revised Statutes of the U. S. (U.S.R.S.)), there were, during the years 1942 to 1949 inclusive, enactments by Congress suspending these requirements (see Appendix F-1, F-2, F-3 and F-4). A further enactment (Appendix F-5) extended the period during which labor may be performed or improvements made for the period commencing July 1, 1949 to the 1st day of October, 1950. 56 Stat. 271; 57 Stat. 74; 62 Stat. 475; 63 Stat. 200; 64 Stat. 275.

Under Federal statute suspending annual work on mining claims and the filing of notice prescribed "one who files or causes to be filed . . . the notice provided for . . . is relieved of doing the annual assessment work . . . the filing of such notice is equivalent in all respects to, and is attended with the same consequences that result from its actual performance" *Field vs. Tanner*, 32 Colo. 278, 75 Pac. 916, "the recording of the notice should have the same legal effect as per-

forming the labor" *Nesbett vs. DeLamar's Nevada Gold Mine Co.,* 24 Nev. 273, 52 Pac. 609.

For the purpose of this Petition, no other matters need be set forth in full. There were other Acts of Congress between the years 1929 and 1949 granting a moratorium on the requirement for annual work or improvements to hold mining claims, but the period of time involved in the statutes set forth in the preceding paragraphs extend over a period of more than five (5) years preceding the locations of Defendants and Respondents below.

The Statute of Limitations in California, which is referred to in Chapter 2, Title 30, Section 38, United States Code Annotated, is five (5) years. Section 1007 of the Civil Code of the State of California and Sections 321 and 322 of the Code of Civil Procedure of the State of California. The applicable portions of these Sections of the California Code are set forth herein in full under previous heading of CONSTITUTIONAL PROVISIONS, etc.

There is no question but that Petitioners filed their notices of intention to hold the mining claims in dispute from 1942 to 1949, inclusive, and that all of these notices were recorded in the Office of the County Recorder in the County in which the claims were located.

The Trial Court, in its Minute Order, Appendix-C, and in its Opinion, filed at the time of entering judgment, based its decision on the fact that there was insufficient evidence to support a finding that the location notices of Petitioners were actually posted on

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the quarter sections claimed thereby. This decision of the Trial Court effectively determined that Petitioners never held a valid right to these mining claims from the very beginning, even though they had recorded these claims and had complied with the requirements of the United States for holding these mining claims for more than twenty (20) years prior to the subsequent locations of the Defendants below.

There was no determination of forfeiture on the part of Petitioners. A forfeiture requires that there be a valid location, United States Revised Statutes, Section 2324, 30 United States Code Annotated, Section 28; *Wilbur vs. United States,* 280 U. S. 306, 74 L. Ed. 445, 50 S. Ct. 103; *Belk vs. Meagher,* 104 U. S. 279, 26 L. Ed. 735; *Kramer vs. Gladding McBean & Co.,* 30 Cal. App. 2nd 98, 85 Pac. 2nd 552, which would mean that Petitioners had, in effect never created a right and interest in the mining claims from which they were subsequently divested. Neither did the Trial Court nor the Appellate Court in their decision, find that there had been abandonment of Petitioners' mining interests. As a matter of fact, as brought to the attention of the Appellae Court, the Trial Court specifically stated, following the close of trial, that they could not find that there was abandonment of the claims because of Petitioners actions in filing and recording notices of intentions to hold the mining claims in dispute.

The Trial Court, in its OPINION, while recognizing that the question had been raised under the Federal Law, see Page 12 of Appendix, applied the principle

of adverse possession of realty in determining whether or not Petitioners were entitled to the benefits under the applicable provisions of the Federal Statute 30 United States Code Annotated, Section 38 (Section 2332, United States Revised Statutes), and, contrary to the decisions of the Courts of California and other states, and of the United States, on this matter, as previously cited, held that the Petitioner's possession necessary to claim the benefits of the Federal Statute, must have been sufficient to entitle them to acquire a title by adverse possession. See Page 15 of the Appendix.

Likewise, the final opinion of the District Court of Appeals of California, upheld this decision of the Trial Court. See Pages 5 and 6 of the Appendix.

CONCLUSION

It is contended that the Federal Statute, Chapter 2, Title 30, Section 38, United States Code Annotated (Section 2332 United States Revised Statutes) is applicable in the matter involved in this Petition. Petitioners filed and recorded their location notices to the disputed mining claims in 1929, setting forth in detail the required descriptions of the public lands claimed by reference to public survey. They worked and held said claims over a period of twenty (20) years without any legal adverse claim being established. They fully complied with the Federal Laws for holding these mining claims for a period of more than five (5) years, 1942 to 1949, inclusive, prior to the relocation of the same public lands by the Defendants below.

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If the decision of the Trial Court in California and the final decision of the California Courts is permitted to stand, no mining claims of long duration could be retained, if actions of the elements, envious locators, or other acts outside of the control of the original locator, should destroy evidence of posting of locations notices at the time the original locations were made.

It is respectfully submitted that in justice and fairness to Petitioners, and in accordance with applicable Federal Laws, this Court should reverse the decision of the Courts of California, or in the alternative, remand this case for new trial with proper instructions as to the law of the United State applicable to the facts presented here.

John W. Howard
Attorney at Law
of
ANDERSON, HOWARD &
ZILLGITT

Appendix

APPENDIX-A

(4th Civ. 4782)—California Dolomite Co., Plaintiff, v. Standridge et al., Appellants; Baxter et al., Respondents. (756 A.C.A. 128) Appellants' petition for hearing denied. Traynor, J., is of the opinion that the petition should be granted.

APPENDIX-B

IN THE DISTRICT COURT OF APPEAL IN AND FOR THE FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

CALIFORNIA DOLOMITE COMPANY, a California corporation, Plaintiff,	)	
vs.	)	
EARL S. STANDRIDGE, S. M. MINGUS, et al., Defendants, Plaintiffs in Interpleader and Appellants,	)	4 Civil No. 4782
NICHOLAS G. BAXTER, et als., Defendants, Defendants in Interpleader and Respondents.	)	**OPINION**

Dist. Court of Appeal—Fourth Dist.

FILED Nov. 10 1954

E. J. VERDECKBERG, Clerk.

....., Deputy Clerk.

Appeal from a judgment of the Superior Court of San Bernardino County, Martin J. Coughlin, Judge. Affirmed.

For Appellants—Anderson, Howard and Zillgitt.

For Respondents—E. John Eriksson; Homer M. Bail.

This is an appeal from a judgment quieting title to certain mining claims.

Several placer mining claims were located in 1949 by the Baxter group of defendants. After certain developments they leased these claims to the California Dolomite Co., which entered into possession and commenced active mining and milling on the premises. A year and a half later, Standridge and Mingus made claim to the royalties, basing their claim of title on locations claimed to have been made by Mingus and his predecessors in 1929 and 1931. Standridge claimed under Mingus and apparently did not appear in the picture until 1950. The Dolomite Co. brought this action to compel the conflicting claimants to interplead and litigate their claims. By appropriate pleadings the different claimants sought to quiet their title to these claims, and the action was tried as if they were plaintiffs and defendants, respectively.

At the trial it appeared, without dispute, that Mingus and others had in 1929 and 1931 recorded six location notices, each describing a different quarter section of land by reference to the Government survey, and that the claims here in question were included within

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some of the quarter sections thus described. The next instrument filed of record was a notice to hold, filed in 1936. Nothing was filed in 1937, and a notice to hold was filed in 1938. Proof of labor was filed for 1939, but nothing was filed for 1940. Proof of labor was filed for 1941, and notices to hold were filed for the years 1942 to 1949, inclusive. Proof of labor was filed for 1950 and 1951, both of these being after the Dolomite Co. was actively mining the property under its leases. A large amount of evidence was received as to what had been done by various parties from 1929 on, with reference to the posting of the original location notices on the property, the building of monuments, the doing of work, visits to the property and the time spent thereon by various persons, what was done and seen at different times in various places, and other matters going to the questions as to whether legal requirements had been fulfilled, the kind and nature of the possession taken, and the use made of the property throughout the years between 1929 and 1949. The court found in favor of the Baxter group, finding that they had located the claims in good faith; that at all material times they were and are the owners of these mining claims; that the claims of Standridge and Mingus, and each of them, are without any right whatever; that neither of them has any right, title or interest in the property; that it is not true that they acquired any interest by reason of the location notices recorded in 1929 and 1931; that it is not true that "all acts necessary and required to maintain said claims

have been performed upon said claims, and that the same are valid and subsisting at the present date"; and that it is not true that these claims are now owned and held by these plaintiffs or that they are entitled to the possession thereof. Judgment was entered accordingly, quieting title to these claims in the Baxter group, and Standridge and Mingus have appealed from that judgment.

The appellants contend that the court's opinion and judgment was based squarely upon the fact that he considered the testimony of Mingus so contradictory and unsatisfactory as not to be sufficient to support a finding that copies of the location notices which were recorded in 1929 were actually posted upon the quarter sections claimed thereby. This contention is based upon a minute order entered some five months before judgment was entered. However, there were several hearings thereafter with reviews of the evidence, a rereading of portions of the evidence, and arguments, and the findings are not limited to that issue. With this background it is then contended that the recording of the location notices in 1929 and 1931, and the filing of the affidavits of work and notices to hold, made it unnecessary for the appellants to prove that location notices were posted on the ground because of the provisions of Section 2332 U.S.R.S. (Sec. 38, Chap. 2, Title 30, U.S.C.A.), and the construction of that section as applied in *Lind v. Baker,* 31 Cal. App. 2d 631; *Hess v. Moodey,* 35 Cal. App. 2d 401 and *Phelps v. Pacific Gas & Electric Co.,* 112 Cal. App. 2d 558; that the recording and filing of these papers sufficiently

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showed all the possession required by law and conclusively established appellants' title, since no other acts are required other than those usually exercised by the owners of such mining claims; that appellants' recorded location notices were *prima facie* evidence of the performance of all statutory requirements; that the evidence was not sufficient to support the finding to the effect that the location notices were not posted; that since the respondents had knowledge of appellants' claims through the recorded location notices the lands were not open to relocation; and that, in any event, the court erred in refusing to grant a new trial on the ground of newly discovered evidence.

Appellants' main contention, that the recording of the location notices in 1929, and the filing of proofs of labor and notices to hold, are sufficient to obviate any necessity for further proof on their part, because of section 2332 U.S.R.S.; and that this is established by such cases as *Lind v. Baker* and *Hess v. Moodey*, cannot be sustained. The mere recording and filing of such papers without regard to what was done on the ground could not be conclusive, and the cited cases do not so hold. Assuming that such recording and filing would be sufficient to make out a prima facie case, this may well be overcome by evidence of the factual situation and what was actually done. Section 2332 U.S.R.S. provides that where persons have held and worked their claims for the required period, evidence of such possession and working shall be sufficient to establish a right to a patent. That the elements of holding and working the claims, and the matter of

continued possession in the manner contemplated by the mining laws, are questions of fact and dependent upon the evidence received in a particular case, is fully recognized in *Lind v. Baker, Hess v. Moodey,* and all the other cases to which our attention has been called. Factual questions were here presented with respect to whether the legal requirements had been met, including the proper posting of notices, the erection of monuments on the ground, the doing of work, the nature of the possession taken and held, and the use made of the claims in question. Affidavits that work has been done are not conclusive and the other party may prove that the work was not, in fact, done. (*Brown v. Murphy,* 36 Cal. App. 2d 171.) Affidavits of intention to hold would not be controlling if, for other reasons, the party was not entitled to hold regardless of whether or not work was done for that year.

If, as we think, factual questions were properly presented and considered by the court, the evidence amply sustains the findings and judgment. The record is voluminous, and it would serve no useful purpose to review the evidence in detail. The testimony of Mingus, the main witness for the appellants, was not only self-contradictory but was so obviously incorrect in many respects, as shown by a number of well established facts, that the judge was justified in concluding, as stated by him, that he was unable to accept such testimony as sufficient to support findings favorable to the appellants. Mingus was 82 years of age and his testimony was far from satisfactory. Among other things, he testified that he lived for a part of one sum-

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mer in a cabin which was shown to have been torn down several years before, and that he lived for some time in an old tunnel which was shown to have been occupied at that time by others who had not even seen him there. It was clearly shown that some notes he said he had put in certain places were actually placed on other quarter sections. It rather clearly appeared that Mingus did not know where he did any such work as he claimed to have done, and the trial judge observed "he did it some place out in this general territory, all true, but the type of work was not such as to impress itself upon anybody. He said himself the work he did there in his acts of possession amounted to scratching the surface in a number of places, with one exception". This exception was one old tunnel in which considerable work had been done, but there was substantial evidence that this work had been done by a number of other people over many years. The evidence, with the reasonable inferences therefrom, fully supported the conclusion that the original location notices had not been posted on the property, and that no proper monuments had been constructed. A great many people had prospected over these properties over the intervening years, some of them spending many months there, and none of them ever saw Mingus there. None of them ever saw any evidence of his claimed location notices or monuments with one exception, which is neither convincing nor controlling. There is no evidence which would indicate the actual, visible, open and hostile possession required by law, making full allowance for the difference between the showing

required in connection with a mining claim and that required for agricultural lands. No possession was shown which was open and notorious, and none of the many witnesses who were on the property during considerable periods over the years ever saw Mingus there and he never saw any of them. No hostile claim was ever made by him until long after respondents' locations were made. There was no continuous possession shown, there was no evidence that anyone was there between 1929 and 1936, Mingus said he visited the property once a year but might have missed some years, and he testified that he thought he was out there one, two or three times between 1942 and 1947. No exclusive possession is shown as it appeared that other locators were in possession for a time in 1934, in 1937, and in 1947. While the evidence was conflicting in some respects it sufficiently supports the court's findings.

On the matter of claimed newly discovered evidence, in connection with the motion for a new trial, it was claimed that since the trial Mingus had located a surveyor who had made a survey of these sections in 1929, that this surveyor was one of the original locators of these claims, and that he would testify that he assisted in, saw or personally placed said location notices on the ground and in the proper places on the quarter sections described in such notices. There was a very unsatisfactory showing of diligence in obtaining any such evidence in time for the trial. This surveyor stated in an affidavit "that he has no records relative to any surveys made in 1929 for S. M. Mingus, or at

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any other time." He also stated that he had continuously resided in the same place since 1922, that he had operated a regular office for the last 12 years, and that he was listed in the telephone book. While he stated in another affidavit that he assisted in placing location notices on said claims on the quarter sections described in each notice, and while this would have corroborated Mingus' testimony with respect to one point, it would merely have added to the existing conflict in the evidence and would have been far from conclusive in view of the evidence as a whole on all of the points involved. The affidavit of Mingus stated that he located this surveyor on September 20, 1952, and this matter was not brought to the attention of the court until February, 1953, although an extensive hearing as a part of the case was held in November, 1952, and judgment was not entered until February, 1953. No abuse of discretion appears in this connection.

The judgment is affirmed.

BARNARD
P. J.

WE CONCUR:

GRIFFIN
J.

MUSSELL
J.

APPENDIX-C

No. 69244

[TITLE OF COURT AND CAUSE]

MINUTE ORDER

Monday the 22nd day of September 1952, at 10:00 o'clock A.M., Dept. I—

Present Hon. MARTIN J. COUGHLIN, Judge

Harry L. Allison, Clerk, By Chas. Siegel, Deputy Clerk

Eugene L. Mueller, Sheriff, By George Klapp, Deputy Sheriff

In the above entitled action heretofore submitted, the Court now makes the following Findings and Order:

The Claimants Mingus, et al, in their brief, define the real issues in the case as follows:

1. Did they make a valid location of the claims involved, and,

2. Were these claims in good standing at the time of the alleged relocation thereof by Baxter and Williams.

After reviewing the evidence at length and with considerable care, the Court concludes that the testimony of Mr. Mingus is so contradictory in several different and material respects that it does not carry the convincing force essential to a finding that the location

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notices under consideration were actually posted upon the quarter-sections claimed thereby.

The Court will find in favor of the claims of Baxter and Williams, whose Attorney will prepare Findings and Judgment accordingly.

APPENDIX-D

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN BERNARDINO

CALIFORNIA DOLOMITE COMPANY, a California Corporation, Plaintiff,	)	
vs.	)	
NICHOLAS G. BAXTER, et al., EARL S. STANDRIDGE and S. M. MINGUS, Defendants.	)	No. 69244
EARL S. STANDRIDGE and S. M. MINGUS, Plaintiffs,	)	**OPINION**
vs.	)	
NICHOLAS G. BAXTER, NORRIS H. WILLIAMS, et al., Defendants.	)	

Heretofore the Court expressed his opinion that the evidence was insufficient to sustain a finding that Mr. Mingus actually located the claims in question. Since the argument upon the objections to the proposed findings of fact, the Court again has reviewed the testimony and is of the same opinion as heretofore expressed.

At the time of that argument it was urged that Mr. Mingus had been in possession of the mining claims in question for a period in excess of five years and that, for this reason, a location of the claims in the manner prescribed by law was not essential to a finding entitling him to the relief prayed for in his complaint. Further, it is contended that Mingus was in constructive possession of all of the claims filed upon by him by virtue of the fact that he was in actual possession of a part of some of those claims. This argument requires a consideration of two issues: one of fact, and one of law.

The issue of fact is with respect to the possession by Mr. Mingus. Before a person may claim any rights by virtue of his possession of an alleged mining claim, even though he enter the property claimed by him under color of title, i.e., by recording a notice of location describing the claim in question, he actually must be in possession of that property. As contended by Mr. Mingus, possession of property held under color of title need not extend to all parts of the property. It is the law that a person in actual possession of a

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part of a parcel of property claimed under color of title is in constructive possession of the whole of said parcel. (California Code of Civil Procedure, Section 322.)

In *2 Cal. Jur. (2d) 584* it is said

> "Constructive possession is that possession which exists in contemplation of law without actual personal occupancy of property, that is, such a possession as in contemplation of law proceeds from the vesting of the paramount title or which follows in the wake of the legal title. What constitutes constructive adverse possession of land where possession is taken under color of title is defined by statute. The effect of the statute is not to make the instrument evidence of adverse possession, but to extend the claimant's possession of any portion of the land included in the instrument to the whole of that land."

The following, in substance, is the testimony of Mingus concerning acts of possession by him:

"Since the locations I have gone on the property—I did quite often—I have been many times upon the property—I would *go once a year at least* and sometimes several times—I was out to the property almost every year since 1929—I missed some of the years there was a moratorium on the assessment work—I did not miss all of the years during which there was a moratorium—I was out in 1938 during the summer—I was out *practically* every year.

"There were two small cabins on the property—I did not build them—I lived in them for a while—the cabins were on the Alta—they were near the old tunnel.

"The work was done principally on the Portland—it was all superficial work—no great depth—part of the work was not done on the Portland—the open cut work was done on practically all of the claims—I did surface work—open cuts—trenching—most of the work was on the Portland and Alta and some on the Silver Reef—I built up an old road that was completely washed out; this was on the Portland and Alta; I don't know in what years I did this—in the early 30's I excavated some; made some small cuts; you would find monuments most everywhere."

The only conclusion supported by the foregoing testimony is that Mr. Mingus did a little prospecting on these claims, most of which was on the claims not involved in this lawsuit, and that he did some road work on the Alta and the Portland. It appears that for some years he was not on the property at all. Although it may be assumed that during those years when Proof of Labor was filed the amount of work necessary to comply with the law was performed, the evidence does not justify a finding that Mingus was in possession for any greater time than necessary to perform the minimum amount of work required. In addition, it may be assumed, that during those years when a Notice of Intention to Hold was filed in lieu of annual assessment work no assessment work had been performed.

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From other testimony in the record, it appears that a great number of lode mining claims had been filed upon the property under consideration. It also appears that Just and his associates caused Placer location claims to be filed thereon. The persons making the lode claims, as well as those making the Placer locations, did not see Mr. Mingus and did not see any of the work he claimed to have performed. It cannot be said that his possession was exclusive.

The acts of possession by Mingus did not constitute that type of adverse possession essential to acquire a title by adverse possession. The cases relied upon in support of the contention by Mr. Mingus that his alleged possession of the mining claims obviated the necessity of making a location as required by law does not establish that the acts of Mingus in prospecting on the property in question or in doing a small amount of development work, or in building roads to the property constitute the possession essential to invoke the doctrine relied upon.

In *Lind vs. Baker,* 31 Cal. App. (2d) 631, 636, the type of possession referred to is

> "actual, open, and exclusive possession of the ground for a period equal to that required by the local statute of limitations governing adverse possession of real estate."

It is the opinion of the Court that possession for a few days out of a year is not the possession contemplated by the rule relied upon by Mr. Mingus.

The case of *Brown vs. Murphy,* 36 Cal. App. (2d) 171, involves the question of the good faith of subsequent locators rather than the question of the adequacy of the possession of prior locators. The efficacy of the recordation of a notice of location as notice of the area claimed by a prior locator, although material to the good faith of a subsequent locator, is not material to the sufficiency of the acts of possession by the prior locator.

The case of *Joy vs. Stump,* 12 Pac. 929, correctly states the position of Mr. Mingus that a person in actual possession of a part of a mining claim is in constructive possession of the whole of the claim as described in his recorded notice of location. However, that case does not dispense with the necessity of actual possession of a part of the claim in question for the time prescribed by law.

The issue of law raised by the Mingus contentions is whether possession of a part of one mining claim constitutes possession not only of the whole of that mining claim but also of all contiguous mining claims.

It is the opinion of the Court that the doctrine of constructive possession under claim of right would not extend acts of possession performed upon one mining claim to contiguous mining claims. The rule of law which provides that work done on one mining claim will be considered in meeting the assessment requirements for contiguous mining claims would not extend the rule which provides that the possession of a part of a parcel of land under claim of right is constructive

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possession of the whole of said parcel, to the end that possession of a part of a mining claim under a recorded location notice constitutes possession of several contiguous mining claims purportedly held under several recorded location notices.

Mr. Mingus and his associate also contend that Baxter and his associates are estopped to deny the validity of the alleged locations by Mingus because Baxter has attacked the sufficiency of the assessment work which Mingus claims to have done upon the property.

In support of this contention the case of *Hess vs. Moodey,* 35 Cal. App. (2d) 401, is cited. This case, in turn, cites *Moodey vs. Dale Consolidated Mines,* 81 Fed. (2d) 794, 796, which was a companion case. In the latter case the Court said:

> ". . . appellant, in his case in chief, . . . introduced evidence to show a forfeiture of any location made prior in time to appellant's location. . . . It is apparent that appellant knew of the prior location, and his evidence of forfeiture must be considered as an admission by him of such prior location; and since appellant admitted, in his case in chief, the prior location, there was no necessity for proof of such fact by defendant." (Underscoring by writer.)

In the case at bar the defendants Baxter, et al., did not admit any prior location. The answer of said defendants deny that the plaintiffs Mingus, et al., made any valid locations. It is true that the defend-

ants also allege a forfeiture for failure to perform annual assessment work. As there can be no forfeiture of a mining claim until such claim has been located, the pleadings present inconsistent defenses. The general rule governing such matters is stated in *Hoffman vs. Southern Pacific Company,* 84 Cal. App. 337, 348, as follows:

> "But under the statute of California and in nearly all code states the defendant may set forth in his answer as many defenses as he may have, so long as they are separately stated . . . And these separate defenses may also be absolutely inconsistent . . . It is quite apparent that to hold that a defendant must first confess his own negligence before he will be permitted to charge the plaintiff with contributory negligence is in direct conflict with the clear declaration of the legislature and the uniform decisions of our courts with respect to the right to set up various conflicting defenses."

In *21 Cal. Jur. 134,* it is said:

> "While each defense must be consistent in itself, especially when the pleadings are verified, it is settled that a defendant may set up in his answer defenses which are inconsistent, one with the other, and may offer evidence in support thereof. The rule is the same although the pleadings are verified. A defendant does not waive his rights under one defense by pleading another and inconsistent defense, nor may a defense be disregarded merely because it is inconsistent with some other defense pleaded, since denials, admissions, or allegations

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in one defense remain unaffected by matter inconsistent therewith in a separate defense. Thus the answer may, in a special defense, admit an allegation previously denied without destroying the effect of the denial, as such admission relates only to the defense in which it is set forth. Likewise, a denial in one defense is not affected or waived by setting up inconsistent affirmative matter in another." (Underscoring by writer.)

Under the foregoing well established rules a defendant in a quiet title action involving a mining claim may deny the existence of a valid location by the plaintiff and also allege that any mining claim located by the plaintiff has been forfeited for failure to do the required annual assessment work. Any rule to the contrary finding support in *Hess vs. Moodey,* 35 Cal. App. (2d) 401 must be limited to the situation in that case, where a plaintiff attempted to prove his case in chief by evidence of the defendants' failure to perform the required assessment work.

It is the opinion of the Court that Mingus and his associate have not established the material allegations of their complaint.

The Court is preparing findings in conformity with his prior announcement.

Dated this_____day of February, 1953.

MARTIN J. COUGHLIN
Judge

APPENDIX-E

Chapter 2, Title 30, Section 38, United States Code Annotated

Evidence of possession and work to establish right to patent.

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under section 21-24, 26-30, 33-48, 50-52, 71-76 of this title, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.
R. S. Section 2332

APPENDIX-F-1

Act of May 7, 1942—Chapter 294, 56 U. S. Statutes at Large (Stat.) 271

AN ACT

Providing for the suspension of annual assessment work on mining claims held by location in the United States, including the Territory of Alaska.

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of section 2324 of the Revised Statutes of the United States, which requires on each mining claim located, and until a patent has been issued therefor, not less than $100 worth of labor to be performed or improvements aggregating such amount to be made each year, be, and the same is hereby, suspended as to all mining claims in the United States, including the Territory of Alaska, during the years beginning at 12 o'clock meridian July 1, 1941, and ending at 12 o'clock meridian July 1, 1943: *Provided,* That every claimant of any such mining claim, in order to obtain the benefits of this Act, shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian July 1, 1942, and July 1, 1943, a notice of his desire to hold said mining claim under this Act: *Provided further,* That such suspension of assessment work shall not apply to more than six lode-mining claims held by the same person, nor to more than twelve lode-mining claims held by the same partnership, association or corporation.

Approved May 7, 1942.

APPENDIX-F-2

Act of May 3, 1943—Chapter 91, 57 U. S. Statutes at Large (Stat.) 74

AN ACT

Providing for the suspension of annual assessment work on mining claims held by location in the United States, including the Territory of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of section 2324 of the Revised Statutes of the United States, which requires on each mining claim located, and until a patent has been asked therefor, not less than $100 worth of labor to be performed or improvements aggregating such amount to be made each year, by, and the same is hereby, suspended as to all mining claims in the United States, including the Territory of Alaska, until the hour of 12 o'clock meridian on the 1st day of July after the cessation of hostilities in the present war as determined by proclamation of the President or concurrent resolution of the Congress: *Provided,* That every claimant of any such mining claim, in order to obtain the benefits of this Act, shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian of July 1 for each year that this Act remains in effect, a notice of his desire to hold said mining claim under this Act.

Approved May 3, 1943.

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APPENDIX-F-3

Act of June 17, 1948—Chapter 494, 62 U. S. Statutes at Large (Stat.) 475

AN ACT

Providing for the suspension of annual assessment work on mining claims held by location in the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of section 2324 of the Revised Statutes of the United States, which requires on each mining claim located, and until a patent has been issued therefor, not less than $100 worth of labor to be performed or improvements aggregating such amount to be made each year, be, and the same is hereby, suspended as to all mining claims in the United States, until the hour of 12 o'clock meridian on the 1st day of July, 1948: *Provided,* That every claimant of any such mining claim in order to obtain the benefits of this Act shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian of July 1, 1948, a notice of his desire to hold such mining claim under this Act.

Approved June 17, 1948.

APPENDIX-F-4

Act of June 17, 1949, Chapter 221, 63 U. S. Statutes at Large (Stat.) 200

AN ACT

Providing for the suspension of annual assessment work on mining claims held by location in the United States and enlarging the liability of damages caused to stock raising and other homesteads by mining activities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of section 2324 of the Revised Statutes of the United States, which requires on each mining claim located, and until a patent has been issued therefor, not less than $100 worth of labor to be performed or improvements aggregating such amount to be made each year, be, and the same is hereby, suspended as to all mining claims in the United States until the hour of 12 o'clock meridian of the 1st day of July 1949: *Provided,* That every claimant of any such mining claim in order to obtain the benefits of this Act shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian of August 1, 1949, a notice of his desire to hold said mining claim under this Act: *Provided further,* That any labor performed or improvements made on such mining claim during the year ending July 1, 1949, may be credited against the labor or improvements required to be performed or

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made for the year ending at 12 o'clock meridian on the 1st day of July 1950.

Sec. 2. . . . . .

Approved June 17, 1949.

APPENDIX-F-5

Act of June 29, 1950—Chapter 404, 64 U. S. Statutes at Large (Stat.) 275

AN ACT

Providing for an extension of the time during which annual assessment work on mining claims held by location in the United States, including Alaska, may be made, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time during which labor may be performed or improvements made, under the provisions of section 2324 of the Revised Statutes of the United States, on any unpatented mining claim in the United States, including Alaska, for the period commencing July 1, 1949, is hereby extended until the hour of 12 o'clock meridian on the 1st day of October 1950: *Provided,* That assessment work or improvements required for the year ending at 12 o'clock meridian July 1, 1951, may be commenced immediately following 12 o'clock meridian July 1, 1950.

Approved June 29, 1950.

APPENDIX-G

V

The decision and judgment is against the evidence and against the law generally, and particularly in this, to wit:

(a) The evidence shows, in fact, it is admitted by BAXTER and his associates, that the recording of the MINGUS' claims were filed of record, July 1, 1929, and the evidence shows, without controversy and without dispute, that MINGUS and his associates took possession of said claims and continued in possession of said claims for at least ten (10) years without any adverse claims being filed. A Statute of the United States, Section 38, Chapter 2, Title 30 U.S.C.A., provides as follows: "Where such person or association they and their grantors have held and worked their claims for a period equal to the time prescribed by the Statute of Limitations for mining claims of the state or territory wherever the same may be situated, evidence of such possession and working of the claim for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim." The Statute of Limitations in California is five (5) years. It is the law that such right exists regardless of defects in a location notice. This rule is recognized and applied in California.

Lind vs. Baker, 31 C. A. 2d, 631—at page 635.

See also

Hess vs. Moodey, 35 C. A. 2d, 401—where this case and others are cited and upheld.

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The possession under the recorded location notices and the working of the same by doing the assessment work and/or complying with the exemption laws for more than five (5) years gives an adverse possession which cannot be questioned on the ground of defects in the location notices. Therefore, all BAXTER and his associates could question or attack would be the question of forfeiture or abandonment, and this being a case of quiet title by the different claimants, it is the established rule that a party in a quiet action must prevail upon the strength of his own title and not upon any lack of title in the Defendant.

APPENDIX-H

II

The Statute of the United States, Sec. 38, Chapter 2, Title 30, U.S.C.A. (Sec. 2332 U.S.R.S.) provides that if anyone has held possession for a period equal to the time of the statute of limitations of a mining claim (in California, five years), that this obviates the necessity of proving location notices having been posted. This law is for the purpose of curing defects in location notices or the necessity of proving that same have been made, after the period of limitations has run. This rule is recognized and applied in California, obviously because time and the elements, wandering animals, envious locators and many other things can destroy the posted location notices and make it, as it was in this case after many years, almost impos-

sible to prove that said location notices were posted. *Lind vs. Baker,* 31 C. A. 2d 631. This matter is forever settled in this jurisdiction by the case of *Hess vs. Moodey,* 35 C. A. 2d 401, since the Supreme Court upheld the very able decision in this case by denying an application for a hearing on June 4, 1940.

This rule of law and the binding force of this Federal statute is fully set forth in Volume 2, Cal. Jur., 2d, Section 15, under the title of Adverse Possession, at page 514, and cites a large number of cases, stating the rule to be "the effect of this statute is simply to declare that possession for the statutory period is equivalent to a valid location." Citing the cases of *Altoona Quicksilver Mining Co. vs. Integral Mining Co.,* 114 Cal. 100; *Judson vs. Herrington,* 71 C. A. 2d 565. Stating further, "it is not required that the claimant do all the things necessary to acquire right by adverse possession to a mining claim under the laws of the state where the claim is located, but only that he has held and has worked it where work is required, for a period equal to that prescribed by the Statute of Limitations for mining claims of the state in which the mine is located." Citing *Dalton vs. Clark,* 129 C. A. 136; *McLean vs. Ladewig,* 2 C. A. 2d 21. Actual possession, as applied to agricultural land, is never required in the case of a mining claim. *Atwood vs. Fricot,* 17 Cal. 38; *Patterson vs. Keystone Mining Co.,* 23 Cal. 575, at page 576; *Walsh vs. Hill,* 38 Cal. 481. A miner's possession is complete when he does the work necessary to comply with the laws of the United States and of the state relative to the regular holding of a

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mining claim. Volume 2, Cal. Jur., 2d, page 452, Section 38 and Section 75, page 580 and a holding under color of title is a holding under any written instrument duly recorded on its face describing the land, even though void or voidable. Volume 2, Cal. Jur., 2d, Adverse Possession, Section 77, pages 581, 582. Appellants' color of title, under duly recorded location notices with their exact description of property claimed, existed without actual personal occupancy of the property. It is the possession in the contemplation of law which precedes the vesting of the paramount title or which follows in the wake of the legal title. Volume 2, Cal. Jur., 2d, 584; Adverse Possession, Section 80.

APPENDIX-I

V

The section of the United States Statute cited above, to-wit: Section 2332, was enacted July 9, 1870, and has been the law through all the years since that time and all the courts and the Legislatures of the States of the United States have accepted the ruling of the courts upon this question. This is a question of law applied to undisputed facts. Mingus and associates took possession under the recorded notices and held possession in every contemplation of the law for more than the five year period, and these facts made it unnecessary for Appellant to prove the posting of the location notices on the property or that there were

valid location notices so posted. Respondents ignore the holding of this court and other courts on the construction of this statute. They brush aside *Lind v. Baker,* 31 CA 2d 631; *Altoona Quicksilver Mining Co. vs. Integral Mining Co.,* 114 Cal. 100; *Judson vs. Herrington,* 71 CA 2d 565; *Dalton vs. Clark,* 129 CA 136; *McLean vs. Ladewig,* 2 CA 2d 21; and all other cases cited by us and the text books cited by us upon this question in our opening brief.

APPENDIX-J

ARGUMENTS AND AUTHORITIES

The court has misinterpreted the provisions of Section 38, Chapter 2, Title 30 (U.S.C.A.), Section 2332 U.S.R.S. The property in question is Federal land and the United States has the right to determine the manner in which title to the same shall be held. This statute was passed for the express purpose of caring for such a condition as confronted the court in this case. Neither this court, nor the lower court, has the right to impose additional conditions upon appellant. It is uncontradicted, and without any conflict in the evidence, that valid location notices, carefully drawn, covering this land were duly recorded as required by law. IT IS UNCONTRADICTED THAT NOTICES OF INTENTION TO HOLD THIS PROPERTY, AS PROVIDED BY THE UNITED STATES LAW, WERE FILED FOR THE YEARS 1942 TO AND INCLUDING 1949. It is uncontra-

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dicted that Baxter and his defendants did not file their claims until 1949. It therefore conclusively appears that appellants were in the legal, actual and exclusive possession of these properties for more than five years prior to the location in 1949 of the respondents' claims. All of the questions, all of the so-called evidence presented by the Baxter group was of no avail, and such evidence was admitted only over the continued objections of appellant. It was incompetent and could not prevail against the Federal law. . . .

This appellant spent twenty years pioneering this property, consistently preserving his rights in the manner required by law, and it is neither fair, right, or in the spirit of the West to permit his efforts to be pushed aside by people who come later and take over the results that have been brought about by progress of the country. This opinion violates the law and the binding force of the Federal Statutes. Vol. 2 Cal. Jur. 2nd, Section 15, (Adverse Possession), Page 514, and Volume 2 Cal. Jur. 2nd, Section 38, (Adverse Possession), Page 542, correctly states the law of California in regard to this Federal Statute. This opinion violates the holding in the case of *Altoona Quicksilver Mining Company vs. Integral Mining Company,* 114 Cal. 100; it violates the holding of *Judson vs. Herrington,* 71 CA 2nd 565; it violates the holdings in the case of *Dalton vs. Clark,* 129 CA, 136; it violates the holdings of *Atwood vs. Fricot,* 17 Cal. 38, and *Patterson vs. Keystone Mining Company,* 23 Cal. 575, and *Walsh vs. Hill,* 38 Cal. 481.

APPENDIX-K

GROUNDS FOR HEARING BY SUPREME COURT

The grounds upon which petitioner petitions this court to hear and determine this cause are as follows:

1. Hearing in this Court is necessary in order to secure uniformity of decision upon the construction placed by the Court of Appeals and by the Supreme Court of this state and of the United States upon the provisions of Section 38, Chapter 2, Title 30 (United States Code Annotated) (Section 2332 United States Revised Statutes) and upon the moratorium statutes of the United States in re annual assessment work upon mining claims . . .

I

In connection with the first ground, petitioner submits that the decision of the District Court of Appeals rendered and filed on the 10th day of November, 1954, and reported in 128 ACA No. 5, at Page 756, is directly contrary to and opposed to other decisions in the Supreme Court of this state and of the United States and of the various District Courts of Appeals, in the cases of *Altoona Quicksilver Mining Company v. Integral Mining Company,* 114 Cal. 100, (46 Pac. 902); *Judson v. Harrington,* 71 CA 2nd 565, (162 P2d 931); *Dalton v. Clark,* 129 Cal. App. 136, (18 P2d 752); *McLean v. Ladewig,* 2 CA 2nd, 21, (37 P2 502); *Atwood v. Fricot,* 17 Cal. 38; *Patterson v. Keystone Mining Company,* 23 Cal. 575; *Walsh v. Hill,* 38 Cal. 481; *Hess v. Moody,* 35 CA 2nd 401, (95 P2d 690); *Lind v. Baker,* 31 CA

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2nd 631, (88 P2d 777); *Phelps v. Pacific Gas & Electric Company,* 112 CA 2nd 558, (246 P2d 997).

This opinion also conflicts with the decisions construing Section 38, Chapter 2, Title 30, United States Code Annotated (USCA); Section 2332, United States Revised Statutes (USRS), in the cases of *Cole v. Ralph,* 252 U. S. 286; *Springer v. Southern Pacific,* 67 Utah 596, (248 Pac. 819); *Newport Mining Company v. Bead Lake Gold Mining Company,* 110 Washington 120, (118 Pac. 27); *Law v. Fowler,* 45 Idaho 1, (261 Pac. 667); *Oliver v. Burg,* 154 Oregon 1, (58 Pac. 2d 245); *Humphreys v. Idaho Gold Mining Development Company,* 24 Idaho 128, (120 Pac. 823); *Independent Placer Mining Company v. Hillman,* (Idaho) 109 Pac. 2d 1038, and *Glacier Mt. Mining Company v. Willis,* 127 U. S. 471, 32 L. ed. 172; *Dripps v. The Allison's Mines Company,* 45 CA 95, (187 Pac. 448).

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA,
County of Los Angeles.—SS.

Alice M. Butler, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county aforesaid; that affiant is over the age of eighteen years and is not a party to the above entitled action; that affiant's business address is 135 S. Comstock Ave., Whittier, Calif.; that on March 22, 1955, the affiant served the within Petition for Writ of Certiorari and Appendix by placing three true copies thereof in envelopes addressed to: CLERK OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, State Building, Civic Center, San Francisco, California; the CLERK OF THE DISTRICT COURT OF APPEAL, Fourth Appellate District, State of California, 263 Third Street, San Bernardino, California; CLERK OF THE SUPERIOR COURT OF THE COUNTY OF SAN BERNARDINO, State of California, County Courthouse, San Bernardino, California; Woodrow W. Baird, Attorney for PLAINTIFF, California Dolomite Company, 5843 Atlantic Avenue, Long Beach, California; E. John Eriksson and Homer M. Bail, Attorneys for DEFENDANTS, DEFENDANTS IN INTERPLEADER AND RESPONDENTS, Nicholas G. Baxter, et al., Suite 11, American National Bank Building, San Bernardino, California, and by then sealing and depositing said envelopes, with postage thereon fully prepaid, in the United States Mail at Whittier, California.

That there is delivery service by United States mail at the places so addressed and there is a regular communication by mail between the place of mailing and the places so addressed.

Subscribed and sworn to before

me on_____

_____

Notary Public in and for said
County and State.